

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

David Thul,

Complainant,

vs.

**NOTICE OF DETERMINATION OF
PRIMA FACIE VIOLATION**

Minnesota DFL Party,

Respondent.

TO: All Parties on the Attached Service List

On February 24, 2010, David Thul filed a Campaign Complaint with the Office of Administrative Hearings alleging that the Minnesota DFL Party violated Minnesota Statutes § 211B.06 by preparing and disseminating false campaign material relating to the January 26, 2010 special election for the seat vacated in Senate District 26. After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth a *prima facie* violation of Minn. Stat. § 211B.06. This determination is described in more detail in the attached Memorandum.

THEREFORE, IT IS HEREBY ORDERED AND NOTICE IS HEREBY GIVEN that this matter will be scheduled for a telephone prehearing conference and an evidentiary hearing, to be held at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101. The mailing address for the Office is P.O. Box 64620, St. Paul, MN 55164-0620.

Pursuant to Minn. Stat. § 211B.35, the evidentiary hearing must be held within 90 days of the date the complaint was filed.

You will be notified of the dates and times of both the prehearing conference and evidentiary hearing, and the three judges assigned to hear this matter, within approximately two weeks of the date of this Order. The evidentiary hearing will be conducted pursuant to Minnesota Statutes § 211B.35. Information about the evidentiary hearing procedures and copies of state statutes may be obtained online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the evidentiary hearing, all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law

Judges. Parties should bring with them all evidence bearing on the case with copies for the Administrative Law Judges and the opposing party.

After the evidentiary hearing, the Administrative Law Judges may dismiss the complaint, issue a reprimand, or impose a civil penalty of up to \$5,000. The panel may also refer the complaint to the appropriate county attorney for criminal prosecution. A party aggrieved by the decision of the panel is entitled to judicial review of the decision as provided in Minn. Stat. §§ 14.63 to 14.69.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at 600 North Robert Street, P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TTY).

Dated: March 1, 2010

/s/ Barbara L. Neilson
BARBARA L. NEILSON
Administrative Law Judge

MEMORANDUM

This Campaign Complaint concerns the special election that was held on January 26, 2010, to fill the Senate District 26 seat. Senate District 26 is located in southeastern Minnesota and includes portions of Dodge, Freeborn, Goodhue, Mower, Olmsted, Rice, Steele and Waseca counties. The Complaint alleges that the Minnesota DFL Party violated Minn. Stat. § 211B.06 by preparing and disseminating false campaign material relating to the Republican-endorsed candidate Mike Parry.

Specifically, the Complaint alleges that a campaign flyer prepared by the Respondent and disseminated to residents of Senate District 26 on or about January 25, 2010, contained several false statements. The flyer was directed at candidate Parry's call for a 15% across the board cut to balance the state budget. The flyer stated, in part, as follows:

Politician Mike Parry doesn't care to set priorities. He just says he wants to cut Minnesota's budget 15% across the board.

But here's what he's not telling you – our nursing homes get most of their funds from the Medicaid program, the costs of which are split between the state and the federal government.¹

That means a 15% cut by the state is also a 15% cut by the federal government. That adds up to a 30% cut for care of the elderly and disabled. To Parry and his extremist friends, that's even better news. But it will be a disaster for our parents and grandparents who depend on good folks to care for them in our local nursing homes.

The Complaint acknowledges that Mr. Parry did call for a "15% across the board cut" to balance the state budget. However, the Complainant contends that the statement in the flyer that the state and federal government "split the costs" of Medicaid funding for nursing homes is "a gross simplification of the federal funding formula that determines the federal contribution to state Medicaid costs." While the Complainant concedes that the statement is "technically correct," he argues that it is misleading.

The Complainant also argues that the claim on the flyer that Mr. Parry's proposed "15% cut by the state is also a 15% cut by the federal government . . . [adding] up to a 30% cut for care of the elderly and disabled" is false. The Complainant contends that the flyer's footnote citation to a Minnesota House Research Department brief on Medical Assistance does not support the claim that a 15% cut in state funding would automatically trigger a 15% cut in federal funding. In fact, the Complainant asserts that the research brief documents several areas in which Minnesota provides more funding than is required by federal law for matching grants, and at least two instances in which the governor decreased state funding through unallotment but no corresponding cuts in federal funding occurred. The Complainant maintains that while a federal funding cut is possible, it is false to allege that such a cut would be automatic.

The Complainant also objects to the Respondent citing the name of the author of the Minnesota House Research Department brief on Medical Assistance. The Complainant argues that because the House Research Department is a non-partisan body, use of the author's name in a partisan political mailing was unethical.

Finally, the Complainant objects to the late mailing of the campaign flyer which did not permit time for a response by the Republican candidate. According to the Complainant, residents of Senate District 26 received the flyer on about the day before the election.

Minnesota Statutes § 211B.06, subd. 1, prohibits intentional participation:

... [i]n the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote, or defeat a candidate for nomination or election to a public office or to promote or

¹ Chun, Randall, Medical Assistance, Page 20: www.house.leg.state.mn.us/hrd/pubs/medastib.pdf. (Footnote on flyer).

defeat a ballot question, that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact and not against unfavorable deductions or inferences based on fact.² Moreover, the burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.³ Finally, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.⁴

To prove a violation at the hearing, the Complainant must show that the statement is substantively false and that the person or persons who prepared, disseminated or broadcasted the advertisement did so knowing it was false or communicated it with reckless disregard of whether it was false. The term “reckless disregard” was added to the statute in 1998 to expressly incorporate the “actual malice” standard from *New York Times v. Sullivan*.⁵ Based on this standard, the Complainant has the burden to prove by clear and convincing evidence that the Respondent prepared or disseminated the statement knowing that it was false or did so with reckless disregard for its truth or falsity. The test is subjective; the Complainant must come forward with sufficient evidence to prove the Respondent “in fact entertained serious doubts” as to the truth of the ad or acted “with a high degree of awareness” of its probable falsity.⁶

To allege a *prima facie* violation at this stage of the proceeding, the Complainant must allege sufficient facts to show that a violation of law has occurred.⁷ “Prima facie” means “[s]ufficient to establish a fact or raise a presumption unless disproved or rebutted.”⁸ “Prima facie evidence” is “[e]vidence that will establish a fact or sustain a judgment unless contradictory evidence is produced.”⁹ In determining whether a campaign complaint sets forth a prima facie violation of the statute, the Administrative Law Judge is required to credit as true all of the facts that are alleged in the Complaint, provided that those facts are not patently false or inherently incredible.

² *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981); *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

³ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986).

⁴ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). See also *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996);

⁵ *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964).

⁶ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968); *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964). See also *Riley v. Jankowski*, 713 N.W.2d 379 (Minn. App.), rev. denied (Minn. 2006).

⁷ Minn. Stat. § 211B.32, subd. 3.

⁸ *Black's Law Dictionary* 1228 (8th ed. 2004).

⁹ *Id.* at 598.

The Administrative Law Judge finds that the Complainant has failed to allege a *prima facie* violation of Minn. Stat. § 211B.06 with respect to the statement on the flyer that the state and federal government split the costs of Medicaid funding for nursing homes. While saying that the state and federal government split the costs may be a “gross oversimplification” of the federal funding formula, it is not a false statement of fact. Even the Complainant concedes that the statement may be “technically accurate.” Misleading statements and oversimplifications do not come within the purview of Minn. Stat. § 211B.06. The statute is directed solely at factually false statements that the person communicating either knew were false or communicated with reckless disregard as to whether they were false. This allegation is dismissed.

With respect to the statements on the flyer that a 15% cut by the state is also a 15% cut by the federal government, the Administrative Law Judge finds that the Complainant has alleged sufficient facts at this stage of the process to support a *prima facie* violation of Minn. Stat. § 211B.06 on the part of the Respondent. These statements are capable of being proven true or false. The burden is on the Complainant to prove that the statements are factually false and that Respondent either knew they were false or disseminated the statements with reckless disregard as to whether they were false.

Finally, Complainant's objection to the Respondent's citation to the author of the Minnesota House Research Department brief on Medical Assistance, as well as his objection to the late mailing of the campaign flyer do not state actionable claims under Minn. Stat. Chap. 211B and are therefore these allegations are dismissed.

Based on the above rulings, the sole allegation concerning the statements on the campaign flyer that a “15% cut by the state is also a 15% cut by the federal government ... add[ing] up to a 30% cut for care of the elderly and disabled” will proceed to a prehearing conference and evidentiary hearing to be scheduled in the near future.

B.L.N.